Supreme Court, U.S.
FILED

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No. 04-___

IN THE

Supreme Court of the United States

Ulysses McMillan,
Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 15, 2004

QUESTION PRESENTED

Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of facts that were not found by a jury, where the defendant has entered a guilty plea, because the Guidelines as a whole are constitutionally infirm, and should not be applied.

Further, whether, where defendant has entered a guilty plea, the Sixth Amendment is violated by the application of the career offender sentencing guidelines, which require a determination by the judge as to the nature of prior convictions.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ulysses McMillan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The decision of the Third Circuit (Pet. App. 1a) is unpublished. The court of appeals issued its decision on July 14, 2004, and denied rehearing on August 16, 2004 (id., 2a). This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury .... "

STATEMENT OF THE CASE

Petitioner was charged by indictment with possession with intent to deliver heroin [21 U.S.C. § 841(a)(1)] and carrying a firearm during a drug trafficking crime [18 U.S.C. § 924(c)], said offenses having occurred on March 26, 2003. He entered a guilty plea in the United States District Court for the Eastern District of Pennsylvania to the charges on October 3, 2003, after having entered into a plea agreement, which contained language waiving his rights to appeal or collaterally attack the conviction or sentence. At the time of the entry of the plea, the waiver provision in question was referred to in the government's summary of the agreement, but was not the subject of specific inquiry by the court or counsel.

Objections to the presentence report were filed by the defense, as well as a motion for downward departure from

the guideline ranges deemed applicable by the report, contending [1] that the guideline determination that appellant be sentenced as a career offender pursuant to U.S.S.G. § 4B1.1 significantly over-represented the seriousness of the Petitioner's criminal history and the likelihood that Petitioner will commit further crimes [see U.S.S.G. § 4A1.3 and United States v. Shoupe, 35 F.3d 835 (3d Cir. 1994)], and [2] that a departure was warranted pursuant to U.S.S.G. § 5K2.0 and Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035 (1996). Petitioner was sentenced by the District Court on January 14, 2004 to serve a total term of imprisonment of 262 months, from which sentence Appellant appealed to the Court of Appeals.

The Government moved to dismiss Petitioner's appeal because of the appellate waiver contained in the plea agreement, contending that the Court of Appeals thereby lacked jurisdiction. The appeal was dismissed, and Petitioner requested rehearing [Pet. App. 3a – 14a], in part contending that, under this Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), [1] the Guidelines as a whole are unconstitutional and should not be applied, and [2] the decision *by a judge* to select and apply the career offender sentencing range, pursuant to U.S.S.G. § 4B1.1, offends the principles of Apprendi v. New Jersey, 530 U.S. 466, 494 (2000), since the application of the career offender guideline requires a determination as to the nature of prior convictions [crimes of violence or felony drug convictions].

Both the dismissal of the appeal, and the denial of rehearing, were accomplished without opinion.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The court of appeals has, without opinion, decided an important question of federal law that has not been, but should be, settled by this Court. This Court is considering, *inter alia*, the overall constitutionality of the Guidelines in United States v. Booker, No. 04-104, and United States v. Fanfan, No. 04-105. This Petition contends that, even in the context of a guilty plea to an information which charges the existence of certain prior offenses, Apprendi principles are offended by the sentencing judge's selection of the career offender guidelines.

I. BLAKELY APPLIES TO, AND INVALIDATES, THE FEDERAL SENTENCING GUIDELINES.

The Guidelines establish the limits on the lawful range of punishment a judge may impose on a defendant convicted of a crime. As this case illustrates, judicial factfinding under the Guidelines permits the judge to impose one sentence based solely upon the facts as admitted by the defendant or found by the jury beyond a reasonable doubt, and another, often substantially greater, sentence based on those facts plus others that the judge finds to be true by a preponderance of the evidence. Blakely was a clear reaffirmation of the principle first announced in Jones v. United States, 526 U.S. 227 (1999), first enforced in Apprendi, and applied again in Ring v. Arizona, 536 U.S. 584, 602 (2002). See Blakely, 124 S. Ct. at 2551 (Breyer, J., dissenting) ("[t]he Court makes clear that it means what it said in Apprendi").

That principle is essential to protect the core values of the right to a jury trial. Accordingly, this Court should adhere to the holding of *Blakely*—that a criminal defendant

has the right to insist that every fact which, under the controlling law, authorizes a judge to impose an increased punishment, must be found by a jury beyond a reasonable doubt—and apply it to the Guidelines.

In Blakely, Ring, and Apprendi, the source of law that authorized a judge to impose a sentence based on facts not found by the jury (or admitted by the defendant) was a statute. Blakely, 124 S. Ct. at 2535 (describing Washington Sentencing Reform Act); Ring, 536 U.S. at 592-93 (Arizona first-degree murder statute); Apprendi v. New Jersey, 530 U.S. 466, 468-69 (2000) (New Jersey unlawful firearm possession and hate crime statutes). As a result, the Court has described the failing of the sentences imposed in those cases as exceeding the "statutory maximum" authorized by the jury's verdict. Blakely, 124 S. Ct. at 2537; Apprendi, 530 U.S. at 490; see also Ring, 536 U.S. at 604.

The use of the word "statutory" in these cases results from the fact that the cases involved statutes. The Sixth Amendment rule is indifferent to the source of law—statutory or otherwise—that underlies the judge's sentencing authority. "Every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to punishment." Blakely, 124 S. Ct. at 2543. See also Jones, 526 U.S. at 223 n.6 ("any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

The Guidelines are binding on sentencing judges. If a judge imposes a sentence in excess of the Guidelines-determined range, the defendant is entitled to have an appellate court vacate the sentence. 18 U.S.C. § 3742. Because the Guidelines constrain the judge's legal authority

to impose a sentence, and because the Sixth Amendment requires the actual sentence imposed to remain at or below the maximum amount legally authorized based solely upon the facts found by the jury, every time a judge enhances a sentence under the Guidelines beyond that permitted by the juryfound facts, the Sixth Amendment is violated.

Under the Guidelines applicable in Blakely, if the judge had considered *only* the facts related to the offense of conviction, and Blakely's criminal history, Blakely would have received a sentence of 13 to 17 months. Id. at 2535. Because Blakely admitted the firearm allegation as well, his sentence more than doubled under the Guidelines. The Sixth Amendment was not violated, because Blakely admitted this fact in his plea. Blakely's sentence was constitutionally infirm *only* because the judge increased his sentence beyond what the Washington Guidelines authorized based on the facts Blakely admitted.

The federal "enhancement" here [the career offender guideline] is like Blakely's unlawful deliberate cruelty enhancement: the defendant has no right to insist that the facts authorizing the enhancement be proved to a jury beyond a reasonable doubt. In this case, the offense level was increased from 16 to 37 based exclusively upon judge-found facts.

The Federal Guidelines and the Washington Guidelines operate in the same way, even if the Washington scheme is nominally statutory. The Sixth Amendment invalidates both to the extent they increase the punishment the judge is legally authorized to impose as the result of judge-found facts. Whether the system is statutory or non-statutory, the Sixth Amendment requires this Court to protect

the jury's role, applying the reasonable doubt standard, to check the power of the state to impose punishment.

Because the Guidelines create a right to a maximum sentence based upon the jury's findings, when the Guidelines permit the judge to increase that maximum based upon the judge's own findings, the Guidelines violate the Sixth Amendment.

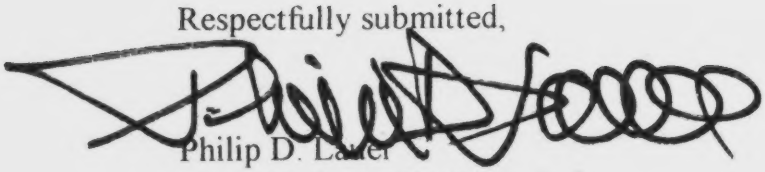
II. THE APPLICATION OF THE CAREER OFFENDER GUIDELINES OFFENDS BRAKELY PRINCIPLES

The application of the career offender guideline requires a determination as to the nature of prior convictions [crimes of violence or felony drug convictions], U.S.S.G. § 4B1.1. This goes beyond the "fact of conviction", apparently permitted under Apprendi. See United States v. Leach, No. 02-172-14, 2004 WL ____ (E.D.Pa. July 13, 2004), in which Judge Dalzell concluded that the finding of a probationary status is a Blakely fact. Although a court is permitted to examine documentation such as indictments, judgments of convictions or other judicially noticeable facts to determine whether a conviction qualifies as a predicate act, Taylor v. United States, 495 U.S. 575 (1990), this is, as a result of Blakely, an inherently factual inquiry, going beyond the mere fact of conviction. See Fed.R.Evid. 201(g) (jury not required to accept as conclusive any fact judicially noticed).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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November 15, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1227

UNITED STATES OF AMERICA

v.

ULYSSES McMILLAN,
Appellant

The foregoing motion to dismiss the appeal for lack of jurisdiction is granted. The appellant;s motion to extend time for filing a response is granted with filing as of the date of this order.

By the Court

/s/ JANE R. ROTH
Circuit Judge

Dated: July 15, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1227

UNITED STATES OF AMERICA

v.

ULYSSES McMILLAN,
Appellant

ORDER

The petition for rehearing en banc filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the court,

/s/ JANE R. ROTH
Circuit Judge

Dated: August 16, 2004

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1227

UNITED STATES OF AMERICA

v.

ULYSSES McMILLAN,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 03-cr-398)
District Judge: Chief Judge James T. Giles

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The Petition of Appellant, Ulysses McMillan, by his counsel, Philip D. Lauer, Esq., respectfully represents as follows:

1. Statement Required by Rule 35(b)(1)(B), Federal Rules of Appellate Procedure. Undersigned counsel

hereby expresses a belief, based on a reasoned and professional judgment, that this proceeding involves:

A. a conflict with the decisions of the United States Supreme Court, in Blakely v. Washington, 124 S.Ct. 2531 (2004), as well as this Court, in United States v. Khattak, 273 F.3d 557, 560 (3d Cir. 2001), and consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions; and

B. a question of exceptional importance, in that the panel decision in this case involves an issue on which the decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue presented.

2. Procedural History

Appellant entered a guilty plea before Chief Judge James T. Giles of the U.S. District Court for the Eastern District of Pennsylvania, after having entered into a plea agreement [see copy attached to government's motion], which contained language waiving his rights to appeal or collaterally attack the conviction or sentence [¶ 9 of plea agreement]. At the time of the entry of the plea, the waiver provision in question was referred to in the government's summary of the agreement, but was not the subject of specific inquiry by the court or counsel.

Objections to the presentence report were filed by the defense, as well a motion for downward departure from the guideline ranges deemed applicable by the report, contending [1] that the guideline determination that appellant be sentenced as a career offender significantly over-represented the seriousness of the Defendant's criminal

history and the likelihood that Defendant will commit further crimes [see U.S.S.G. § 4A1.3 and United States v. Shoupe, 35 F.3d 835 (3d Cir. 1994)], and [2] that a departure was warranted pursuant to U.S.S.G. § 5K2.0 and Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035 (1996). Defendant was sentenced by the District Court on January 14, 2004 to serve a total term of imprisonment of 262 months, from which sentence Appellant has appealed.

Appellant's appeal was dismissed on the government's motion to enforce appellate waiver and for dismissal of appeal for lack of jurisdiction

2. Issues presented.

I. THIS COURT ERRED IN GRANTING APPELLEE'S MOTION TO DIMISS THE APPEAL FOR LACK OF JURISDICTION.

Standard for Enforcement of Waiver

Waivers of appeals are to be strictly construed. However, waivers of appeals, if entered into knowingly and voluntarily, are valid, unless they work a miscarriage of justice. United States v. Khattak, 273 F.3d 557, 560 (3d Cir. 2001). This Court has chosen not to earmark specific situations in which waivers will be deemed invalid. Rather, it has endorsed the First Circuit's approach in United States v. Teeter, 257 F.3d 14 (1st Cir. 2001), where the Court of Appeals set forth certain factors to consider before "relieving the defendant of the waiver":

> The clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a

> sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Teeter, 257 F.3d at 25-26. The governing standard to apply is whether the error would work a miscarriage of justice.

The waiver cannot be deemed knowing and voluntary

In determining whether a waiver of appeal is "knowing and voluntary," the role of the sentencing judge is critical. Under Federal Rule of Criminal Procedure 11:

> (c) Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands the following:
>
> . . .
>
> (6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

In this case, while the government, in its recitation of the terms of the plea agreement, mentioned the waiver, there was not thereafter any specific reference to the waiver by the court or counsel. Further, there were specific references to sentencing guideline offense levels, in addition to references to the maximum sentences. Specifically, a base offense level of 16 for the heroin distribution charge was noted [paragraph 8(a) of the agreement]. No mention

of the possible application of the career offender guidelines was made.

It is submitted, therefore, that there is not a basis to conclude facially that the waiver was even free and voluntary; in fact, it may very well have been misleading to the appellant.

Enforcement of the waiver works a miscarriage of justice

In this case, the appellant alleged, and proved at sentencing, the existence of mitigating circumstances which demonstrated that the guideline determination significantly over-represented the seriousness of the Defendant's criminal history and the likelihood that Defendant will commit further crimes [see U.S.S.G. § 4A1.3 and United States v. Shoupe, 35 F.3d 835 (3d Cir. 1994)], and [2] that a departure was warranted pursuant to U.S.S.G. § 5K2.0 and Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035 (1996).

In summary, it was alleged and proven that [1] Defendant suffered from severe and longstanding dependency on controlled substances [see paragraph 49 of report]; Defendant's father had been drug dependent, and defendant had become addicted to marijuana, cocaine and heroin by age 16; the appellant had made three attempts at drug rehabilitation, on his own, which had been unsuccessful; [2] most of the Defendant's criminal history occurred within a one block area of the City of Newark, NJ, during a period of eleven months, which resulted from the defendant's relapse into drug dependency; [3] Defendant was free of criminal convictions until age 24, when his drug dependency became severe; notwithstanding his drug dependence, appellant had been steadily employed when not incarcerated; and [4] Defendant committed the instant

offense in part because of concern over the reputation for violence of the confidential informant who requested he commit the criminal activity. Specific references to what was alleged and stated, in appellant's pleadings and at sentencing, were set forth in appellant's response to the motion to dismiss.

Existence of Issues of Merit

The government contends that there is no issue of merit which can be raised in this appeal, and thus no miscarriage of justice can occur in the event of enforcement of the waiver. For the reasons stated herein, meritorious issues exist.

Application of
Blakely v. Washington, 124 S.Ct. 2531

Appellant has set forth his contentions in this regard in the following section of this Petition, and reference thereto should be had. Note that this is an issue with apparent merit, which should be considered by this Court.

Application of U.S.S.G. § 5K2.0

A district court may depart from the sentence established by the applicable guideline if the court finds that there exists "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. §3553(b); U.S.S.G. § 5K2.0. " If a potential departure factor is an encouraged factor, the sentencing court is authorized to depart if the applicable guideline does not already take it into account. Koon v.

United States, 518 U.S. 81, 135 L. Ed. 2d 392, 116 S. Ct. 2035, 2045 (1996).

If a proposed departure factor is not mentioned in the guidelines, the sentencing court "must, taking into consideration the structure and theory of both relevant individual guidelines and the guidelines taken as a whole, determine whether the circumstances presented are sufficient to remove the case from the heartland of the applicable guideline." United States v. Sally, 116 F.3d 76, 80 (3d Cir. 1997) (quoting United States v. Brock, 108 F.3d 31, 35 (4th Cir. 1997)).

Application of U.S.S.G. § 4A1.3

The Policy Statement set forth at § 4A1.3 recognizes that the criminal history category may no take into account all the variations in the seriousness of a criminal history which may occur, and permits a departure where the criminal history category does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism [see Commentary following § 4A1.3].

Application to Career Offender Guidelines

In the context of a downward departure from a career offender guideline range, the Third Circuit has held that a court may depart in both criminal history and offense level categories under § 4A1.3 , policy statement. See United States v. Shoupe, 35 F.3d 835, 838 (3d Cir. 1994) ("We believe [the] express reference to offense level departures indicates the Sentencing Commission intended § 4A1.3 to govern more than just departures in the criminal history category."). See also United States v. Rivers, 50 F.3d 1126 (2nd Cir. 1995).

The Second Circuit Court of Appeals has held that a decision to depart pursuant to § 4A1.3 should be "based on

an individualized consideration of factors." United States v. Mishoe, 241 F.3d 214, 219 (2d Cir. 2001). It noted that "such factors might include, for example, the amount of drugs involved in [the defendant's] prior offenses, his role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by placement in [Criminal History Category] VI." Id. According to the Mishoe court, "a major reason for imposing an especially long sentence upon those who have committed prior offenses is to achieve a deterrent effect that the prior punishments failed to achieve. That reason requires an appropriate relationship between the sentence for the current offense and the sentences, particularly the time served, for the prior offenses." 241 F.3d at 220. There is no indication that these factors were considered in the decision to deny the departure

Application of Standards

It is submitted that the Defendant has established that the guideline range for his criminal history category, as well as the offense level, should be adjusted and a departure granted. As set forth in the motion, and as was established at a hearing, there exist mitigating circumstances of a kind, and to a degree, not adequately taken into consideration in formulating the guidelines, which should have been taken into consideration in this case. The failure to properly consider and evaluate these factors is the basis for this appeal, and it is submitted that appellate consideration is appropriate, and should be considered.

Considering the standards set forth in United States v. Teeter, supra, and given the sentence imposed, the error, if found, is grave, the impact on the defendant is substantial, the impact of correcting the error on the government is

minimal, and it cannot reasonably be said that the defendant acquiesced in the result.

The motion to dismiss should be denied.

II. APPELLANT'S SENTENCE IS UNLAWFUL, AND RELIEF SHOULD BE GRANTED, BECAUSE IT VIOLATES THE PRINCIPLES SET FORTH IN BLAKELY v. WASHINGTON, 124 S.Ct. 2531.

On June 24, 2004, the Supreme Court applied Apprendi v. New Jersey to strike down a state sentencing scheme similar to the federal sentencing guidelines. Since that decision, considerable discussion and appellate litigation has centered on the application of Blakely to the federal guidelines.

Appellant herein contends that this issue, although not raised in the Court below, should be addressed in this appeal, since it involves error which is clear, obvious, prejudicial and deserving of correction.

Several courts have concluded that the sentencing guidelines themselves are unconstitutional. See United States v. Sweitzer, et al., No. 1:CR-03-087-01,02,03,04 and 1:CR-04-047 (M.D.Pa. July 19, 2004, order by Judge Rambo), citing to United States v. Coxford, No. 2:02-CR-00302-PGC, 2004 WL 1521560 (D. Utah, July 7, 2004). Other courts have concluded that the guidelines are severable, and the offending provisions may be ignored. See United States v. Leach, No. 02-172-14, 2004 WL ____ (E.D.Pa. July 13, 2004).

Regardless of the approach eventually taken by this Court, it is submitted that Blakely applies in this case, since the application of the career offender guideline requires a determination as to the nature of prior convictions [crimes of violence or felony drug convictions]. This goes beyond the "fact of conviction", apparently permitted under Apprendi. See United States v. Leach, supra, in which Judge Dalzell concluded that the finding of a probationary status is a Blakely fact.

Although a court is permitted to examine documentation such as indictments, judgments of convictions or other judicially noticeable facts to determine whether a conviction qualifies as a predicate act, Taylor v. United States, 495 U.S. 575 (1990), that is likely to be seen, post-Blakely, as an inherently factual inquiry, going beyond the mere fact of conviction. See Fed.R.Evid. 201(g) (jury not required to accept as conclusive any fact judicially noticed).

It is submitted, therefore, that the sentence should be vacated, and the defendant resentenced, without reference to the offending guideline provisions

4. Attachments. Appellant has attached hereto, as Attachment A, the Order entered by the panel on July 15, 2004.

Respectfully submitted:

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